

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

JACK E. REISMAN and CHARLES A.)	
SEMS, On Behalf of Themselves and)	
All Others Similarly Situated,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 02-012-SLR
)	
VAN WAGONER FUNDS, INC., VAN)	
WAGONER EMERGING GROWTH FUND,)	
VAN WAGONER CAPITAL MANAGEMENT,)	
INC., GARRETT VAN WAGONER, ERNST &)	
YOUNG LLP and SUNSTONE FINANCIAL)	
GROUP, INC.,)	
)	
Defendants.)	

MEMORANDUM ORDER

I. INTRODUCTION

Presently before the court is defendants'¹ motion to transfer the case from this district to the United States District Court for the Eastern District of Wisconsin. (D.I. 15) Plaintiffs have filed their opposition. (D.I. 22, 27) For the reasons that follow, the motion will be granted.

II. BACKGROUND

On December 17, 2001, a securities class action was filed in

¹Defendant Sunstone Financial Group, Inc. ("Sunstone") was the first to move to transfer (D.I. 15). Defendants Van Wagoner Funds, Inc., Van Wagoner Emerging Growth Fund, Van Wagoner Capital Management, Inc., and Garrett Van Wagoner ("Van Wagoner") joined in the motion on March 5, 2002. (D.I. 19) Defendant Ernst & Young LLP ("E & Y") joined the motion to transfer on April 2, 2002. (D.I. 25)

the United States District Court for the Eastern District of Wisconsin by Michael F. Mather² on behalf of purchasers of the securities of Van Wagoner Emerging Growth Fund between April 28, 2000 and June 30, 2001. Seven substantially similar actions were later filed in the Eastern District of Wisconsin as well as the instant action filed in this court on January 4, 2002. (D.I. 1) Essentially, all of the cases allege violations of the Securities Exchange Act, 15 U.S.C. §§ 78j(b) et seq., the Investment Company Act, 15 U.S.C. § 80a-35 et seq., and the Investment Advisers Act, 15 U.S.C. § 80b-6 et seq., as a result of plaintiffs' purchase of securities pursuant to a materially false and misleading prospectus. (D.I. 22)

On March 5, 2002, Sunstone moved to transfer the instant action to the Eastern District of Wisconsin, or in the alternative to stay this action until the Wisconsin litigation concludes. (D.I. 15) Although plaintiffs moved to transfer to the Eastern District of Wisconsin before the Judicial Panel for Multidistrict litigation, they have specifically opposed the defendants' motion to transfer in this case, arguing instead that this court should defer to the Judicial Panel to resolve the issue of venue. (D.I. 27) Moreover, included in their motion before the Judicial Panel is a request pursuant to 28 U.S.C. §

²Mather v. Van Wagoner Funds, Inc., 01-CV-1264 (CNC) (E.D. Wisconsin 2001).

1407 for the Eastern District of Wisconsin to be designated as the most appropriate venue for all of the pretrial proceedings, or alternatively for this court to be so designated. Apparently, plaintiffs contend that if this court transfers the action to the Eastern District of Wisconsin, then defendants will move again to transfer to the Northern District of California, where many of the defendants reside and where witnesses are located. (See e.g. D.I. 19, 25) Plaintiffs oppose a transfer to California.

III. DISCUSSION

More than fifty years ago, the Third Circuit Court of Appeals adopted the "first-filed rule" where "[i]n all cases of federal concurrent jurisdiction the court which first had possession of the subject must decide it." Crosley Corp. v. Hazeltine Corp., 122 F.2d 925, 929 (3d Cir. 1941) (quoting Smith v. McIver, 22 U.S. (9 Wheat.) 532 (1824)). Consequently, the second filed action should be stayed or transferred to the court where the first filed action is pending. Peregrine Corp. Peregrine Indus., Inc., 769 F.Supp. 169, 171 (E.D. Pa 1991); Dippold-Harmon Enterprises, Inc. v. Lowe's Companies, Inc., Civil Action No. 01-532-GMS, 2001 WL 1414868 (D.Del. 2001). The rule "encourages sound judicial administration and promotes comity among federal courts of equal rank." E.E.O.C. v. University of Pennsylvania, 850 F.2d 969, 971 (3d Cir. 1988). The decision to transfer or stay the second action is within the discretion of

the trial court. Id. at 972, 977. However,

invocation of the rule will usually be the norm, not the exception. Courts must be presented with exceptional circumstances before exercising their discretion to depart from the first-filed rule.

Id. at 979.

The court finds this action substantially similar to the other eight cases pending in the Eastern District of Wisconsin. Since the Wisconsin action was filed first, approximately two weeks before the instant action, and the remaining seven actions were also filed in Wisconsin, transfer of the Delaware case will promote judicial economy and consistency of results. The possibility that defendants will move to transfer to the Northern District of California is inconsequential to this court at this juncture.

IV. CONCLUSION

For the reasons stated, at Wilmington, this 7th day of June,

IT IS ORDERED that:

1. The motion to transfer is granted. (D.I. 15)
2. The above-captioned action shall be transferred to the United States District Court of the Eastern District of Wisconsin.

Sue L. Robinson
United States District Judge